89-1558

No. _____

In The

Supreme Court of the United States

October Term, 1989

EDWARD STEPHENS, MARION FRANKLIN SHIRLEY, DANIEL B. CARVER, SR., DAVID HOLLAND, SOUTHERN WHITE KNIGHTS, KNIGHTS OF THE KU KLUX KLAN; AND INVISIBLE EMPIRE, KNIGHTS OF THE KU KLUX KLAN, INC.,

Petitioners,

versus

JAMES E. McKINNEY, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Brandenburg vs. Ohio*, 395 U.S. 444 (1969) this Court ruled that the only speech of a political nature that could be legally proscribed and punished is advocacy directed to inciting or producing imminent lawless action in circumstances where it is likely that such speech will incite or produce such action.

The questions presented are:

1. Can expressly racist speeches be deemed to have been such incitements despite the fact that they did not by their terms espouse violent, illegal action, and despite the fact that approximately one-half hour elapsed between the time that these speeches were concluded and the time that certain individuals other than the petitioners threw rocks, bottles, and other debris in the direction of the respondents herein?

2. Should the respondents have been allowed the recovery from the petitioners punitive damages in amounts hundreds of times greater than the compensatory damages awarded by the jury despite the fact that none of the respondents suffered any serious physical or psychological harm during the incident at issue, and regardless of the fact that the petitioners were themselves engaged in conduct protected by the First Amendment?

LIST OF PARTIES

Edward Stephens
Marion Franklin Shirley
Daniel B. Carver, Sr.
David Holland
Southern White Knights, Knights of the Ku Klux Klan, an unincorporated association, and its agents, servants, employees, and assigns.
The Invisible Empire, Knights of the Ku Klux Klan, Inc., a Louisiana corporation, and its agents, servants, employees, and assigns.
James E. McKinney and all other persons who participated in a Brotherhood March in Forsyth County, Georgia on January 17, 1987.

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Respondents.

The petitioners, Edward Stephens, Marion Franklin Shirley, Daniel B. Carver, Sr., and David Holland, Southern White Knights, Knights of the Ku Klux Klan, and the Invisible Empire, Knights of the Ku Klux Klan, Inc., pray that a Writ of Certiorari issue to review the judgment and opinion for the United States Court of Appeals for the Eleventh Circuit, entered in the above styled proceeding on October 27, 1989. That court denied a timely filed suggestion of rehearing en banc on December 4, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit was not officially reported, but is reprinted in the appendix hereto, p.1 of the appendix, infra.

The order of that court denying the petition(s) for rehearing and suggestion(s) of rehearing in banc is reprinted in the appendix hereto, p. 14 of the appendix, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1985(3), the respondents brought suit against the petitioners in the United States District Court for the Northern District of Georgia alleging that the petitioners had conspired to violate their civil rights. When this suit was filed the initial named plaintiff was Hosea Williams, who was also designated as class representative.

During the course of jury deliberations Mr. Williams, as well as several other plaintiffs, withdrew from the lawsuit. The trial court ordered that the suit proceed with James McKinney as class representative.

The jury reached a verdict on October 5, 1988 which was sealed by the court until October 25, 1988. It found in favor of the respondents and awarded both compensatory and punitive damages. The court entered the verdict as its judgment.

The petitioners prosecuted an appeal to the Court of Appeals for the Eleventh Circuit. That court affirmed the judgment of the trial court on October 27, 1989. It further

denied the petitioner's rehearing motions on December 4, 1989.

On March 1, 1990, Justice Kennedy ordered that time for filing this petition for writ of certiorari be extended to and including April 3, 1990.

This jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition to government for a redress of grievances.

42 U.S.C. § 1985(3)

Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote,

from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engage therein do, or causes to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercised any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

During the first days of 1987 Georgia state legislator Hosea Williams, a longstanding and well-known black civil rights advocate, publicized his intention to lead a brotherhood march in Forsyth County, Georgia. The march was to coincide with the birthday of the late Dr. Martin Luther King, Jr. Forsyth County is almost entirely populated by white people and has had a reputation for being hostile to blacks.

Hosea Williams' announcement was viewed as a provocation by the individual and organizational petitioners herein since they were and are ardent racial segregationists. The petitioner Holland was a grand dragon of the Southern White Knights, Knights of the Ku Klux

Klan and the petitioners Edward Stephens and Daniel B. Carver, Sr. were officers in another Klan group, The Invisible Empire, Knights of the Ku Klux Klan. The petitioner Shirley denied being a member of either Klan group, but is a politically active white supremacist.

The petitioners made extensive plans for a Ku Klux Klan counterdemonstration in the area where the march was to occur. The theme of their rally was to be that Forsyth County should remain white. In so doing they fully intended to verbally harass and jeer the brotherhood marchers. However, there is absolutely no evidence in the record that indicates that any of the Klan organizers were themselves planning to commit any violent acts against the respondents or to encourage others to do so.

To publicize their rally the individual petitioners circulated leaflets in the community calling for a peaceful counterdemonstration against the brotherhood march. The petitioner Frank Shirley painted signs to be carried by the participants stating that Forsyth County should remain white. Confederate flags were also to be used as protest symbols. The Klan organizers even procured a specially designated roped off area for their supporters to stand in order to separate them from the brotherhood marchers.

The local law enforcement authorities knew of the intentions of the Klan groups to mount their own demonstration well before the morning of Saturday, January 17, 1987, the date of the brotherhood march. Yet they took no action to prevent this gathering as they evidently did not consider it to be a serious threat to public order.

In the mid-morning hours of that date the Klansmen and their sympathizers gathered at a place not too far distant from the location where they believed the march was to take place. The petitioners Shirley and Stephens were present; the petitioner Carver was on a fishing trip in South Georgia. At that juncture the petitioner David Holland delivered a speech to this assemblage during which he declared:

> At 10:00 o'clock, we need to walk down here to the corner, where those pickaninnies are. We need to let 'em know that we're gonna keep this place white. We mean for it to stay white. You can't have law and order and niggers too. I say one's gotta go. Let it be the niggers. . . .This is a God-fearing community, let's send the creeps on back to the watermelon fields of Atlanta, Georgia. We don't want 'em, don't need 'em, and won't stand for it. And I say let's give 'em a good Forsyth County welcome where we'll keep 'em out of here for seventy more years. Lets disburse and go greet those filthy half-ape niggers, brothers.

Moreover, the petitioner Stephens is alleged to have said during this same interval that the people there assembled should "Throw some peanuts at the monkeys." At trial, Stephens specifically denied making such remarks, however.

While this was crude and emotionally charged rhetoric of the most vulgar sort, the proposition is indisputable that when these statements were made the respondent brotherhood marchers were not anywhere in the vicinity. They did not arrive until at least thirty minutes after the Klans' speeches were concluded. (R10-303)

When the brotherhood marchers did arrive, the Klan counterdemonstrators screamed obscenities and otherwise jeered at them. Nevertheless, there is not one scintilla of evidence in the record that the Klan organizers ever told or directed a single person to make any kind of assault upon the respondents. In fact, the record affirmatively shows that they tried to keep their followers from engaging in any physical confrontations with the marchers.

Violent activity did unfortunately occur when several of the errant Klan sympathizers left their designated area and approached the brotherhood marchers. They cursed the marchers and threw bottles, dirt-clods and other debris at them. Undoubtedly, several of the respondents were hit in this fusillade. It was at this point that the police put the marchers back on the bus in which they had arrived and moved them away from the Klan demonstrators. The brotherhood marchers completed their procession at a point further up the road from where this unpleasant encounter had taken place.

As regrettable as this incident was, the fact remains that absolutely none of the respondents sustained any serious physical or even psychological harm. The record does not reveal that any of them required medical attention. And, as has been noted, they completed their march.

Despite the fact that this alteration did not result in any serious injuries, the incident was the subject of international coverage by the news media. Indeed, the very next week on Saturday, January 24, there was a much larger march in which many prominent political figures and other celebrities participated.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONERS CANNOT BE HELD LIABLE TO RESPONDENTS UNDER 42 U.S.C. § 1985 (3) BECAUSE THEIR ALLEGED CONSPIRACY TO DEPRIVE THE MARCHERS OF THEIR RIGHTS DID NOT, IN FACT, CAUSE THE DENIAL OF THESE RIGHTS ON THIS OCCASION. THE SPEECHES MADE BY THE PETITIONERS WERE NOT, AS A MATTER OF FUNDAMENTAL FIRST AMENDMENT JURISPRUDENCE, INCITEMENTS TO IMMIMENT LAWLESS ACTION SUCH AS COULD HAVE CAUSED A DEPRIVATION OF RIGHTS.

Contrary to the allegation of the Court of Appeals that these petitioners "concocted" a conspiracy to interfere with the respondents' rights, the evidence in the record clearly shows that the petitioners only planned to exercise *their* basic constitutional right of freedom of expression in an entirely lawful manner. No matter how commendable the intentions of the brotherhood marchers may have been, their activities were still a legitimate subject of public interest and criticism in the Forsyth County area. They surely knew that there would be many, many people in this community who would be vocally opposed to them.

While undoubtedly the vast majority of people would consider the opponents of the march to be very backward and retrograde in their views concerning race relations, it is well to remember that this Court has said that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *West Virginia State Board of Education vs. Barnett*, 319 U.S. 624, 642 (1943). Indeed,

just last term this Court specifically held that "The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole – such as the principle that discrimination of the basis of race is odious and destructive, – will go unquestioned in the marketplace of ideas." *Texas vs. Johnson*, ___ U.S. ___, 109 S.Ct. 2533, 2546, 105 L. Ed2d. 342, 362 (1989) The petitioners had every right to organize this counterdemonstration if the First Amendment is to mean anything at all.

In focusing more narrowly upon the events leading up to the crucial incident, the impact of the aforementioned speech given by the petitioner David Holland must be carefully weighed. In this regard the following principles set forth by this Court in *NAACP vs. Claiborne Hardware Company*, 458 U.S. 886, 928 (1982) must be taken into account:

> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."

It will be recalled that this Court set forth this ringing defense of powerful and persuasive speech in a case wherein Mississippi NAACP field director Charles Evers had told his followers that black people of Claiborne County, Mississippi who traded with white merchants

would "have their necks broken" by their own people if they did not observe a boycott against these merchants. 458 U.S. at 900, fn. 28. He also made several other not too subtle threats against those who would violate or otherwise oppose the boycott. A comparison of the language that Evers used with that employed by Holland clearly shows that the speech given by Evers was far more imbued with a spirit of coercion and violence. Most of what Holland said amounted to nothing more than name-calling and invective.

The crux of the matter is therefore the question of whether or not his speech, and to a lesser degree the remarks supposedly made by the petitioner Stephens, constituted legally actionable incitements. *Brandenburg vs. Ohio*, 395 U.S. 444 (1969) specifically held that government can only punish speech if it constitutes an incitement to imminent lawless action. *NAACP vs. Claiborne Hardware Company*, supra, reiterated this precept and further applied it to civil lawsuits wherein plaintiffs seek damages on account of the results of what they contend to be unlawful speech. Moreover, *NAACP vs. Claiborne Hardware Company*, went further and established a rule that the concerted action of several defendants which purportedly involves unlawful speech of a political nature must in fact be the cause of the damage to the complaining parties. See "Note: The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis: *NAACP vs. Claiborne Hardware Company*" 1984 *Wisconsin L. Rev.* 1273, 1290-1291.

In determining whether these statements were incitements, the task is complicated by the fact that this Court

has not set forth detailed and exact criteria for what constitutes a legally actionable incitement. Nevertheless, the Court has definitely stated that it is not enough that words may have a tendency to prompt the hearer to take illegal action; they must in fact explicitly advocate such action. *Noto vs. United States*, 367 U.S. 290, 297-299 (1961) Moreover such words must urge immediate action and not merely advocate unlawfulness at some indefinite point in the future. *Hess vs. Indiana*, 414 U.S. 105 (1973)

The fact that the words expressed are crude, vulgar and patently offensive is not sufficient in and of itself to constitute such an incitement. *NAACP vs. Claiborne Hardware Company*, supra; *Spence vs. Washington*, 418 U.S. 405 (1974); *Cohen vs. California*, 403 U.S. 15 (1971) The language used must clearly and unequivocally advocate immediate lawless action; an actionable incitement by implication is not now recognized in the First Amendment jurisprudence of this Court. That very little is to be left to inference in these matters is recognized by this Court's holding that a "solidity of evidence" must be apparent before a given utterance can be said to give rise to a danger of imminent, immediate lawless action. *Landmark Communications, Inc. vs. Virginia*, 435 U.S. 829, 845 (1978)

The petitioners submit that the proper criteria for determining whether language constitutes an unlawful incitement were set forth by Judge Learned Hand in an opinion that he handed down during World War I, an event which led to much revolutionary agitation in this country. That eminent jurist said:

> To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty

> to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal.

Masses Publishing Company vs. Patten 244 F. 535, 540 (S.D. N.Y. 1917)

Careful examination of the words at issue and the context in which they were uttered clearly shows that their purport was to urge the listeners to jeer and to verbally abuse the brotherhood marchers. The petitioner Holland clearly wanted his followers to bombard the respondents with obscenities and execrations to the extent that they would want to quickly leave Forsyth County and to not come back. The alleged words of the

petitioner Stephens also obviously had a similar derisive intendment. Nevertheless, any person who is intellectually honest can parse these comments ad infinitum and he will not be able to conclude that these words amounted to an express and direct call for imminent, lawless action; that is, assaults upon the marchers.

The interval that passed between the time of the speeches and the onset of the violence is similarly fatal to the notion that this language constituted an actionable incitement. This Court has not yet had the occasion to deal with the question of how much intervening time will serve to preclude an inflammatory speech from being deemed to be the cause of unlawful action. Nevertheless, it has dealt with an analogous situation when it has considered the possible prejudicial impact of a prosecutor's closing argument at the sentencing phase of a death penalty case. In *Darden vs. Wainwright*, 477 U.S. 168 (1986) the prosecutor delivered a wrenching closing argument during which he repeatedly referred to the defendant as an "animal". This Court said that this tirade was so egregious that it deserved the condemnation that it had received from every court that had previously reviewed the case. 477 U.S. at 179. This assessment notwithstanding, the Court declined to overturn Darden's death sentence.

An important circumstance that the Court cited in so ruling was the fact that the prosecutor's speech was not the last word on the issue because the defendant had been allowed to deliver a rebuttal argument afterwards. The Court implicitly held that this argument, which took place between the prosecutor's statement and the actual deliberations of the jury, was sufficient to dissipate the

emotional impact of the prosecutor's argument on the listeners. Of course, the countervailing argument was also a factor upon which the Court relied.

The clear implication of *Darden vs. Wainwright* is that the alleged wrongful conduct of those who have listened to an arousing speech must be so proximate in time to the delivery of the words that the proposition can be readily inferred that the speaker unduly influenced the listeners to act in such a manner and that the speaker virtually displaced the listeners' wills with his own. In this regard, the emotional state of the listeners as they heard the speech and the nature of their prior relationship with the speaker are also powerfully relevant factors in determining whether the words constituted an unlawful incitement.

The record herein clearly shows that the listeners were not agitated after these comments were expressed and that they certainly were not wrought up in any kind of frenzy that would have moved them to immediately respond in a violent manner to these words. Moreover, the listeners were not shown to be acquainted in any way with the petitioners Holland and Stephens prior to this incident.

The brevity of these remarks is also a strong factor that tends to indicate that the words did not cause the resulting altercation since they were undoubtedly spoken in a matter of seconds. It is highly improbable that they motivated those who heard them to act in any manner after a period of at least thirty minutes had passed after the time that they were spoken.

The question thence arises as to whether the petitioners can be held liable for this incident even if they did not intend the consequences of their actions in organizing this counterdemonstration and in speaking the crucial words. The record manifestly shows that they did not intend violent consequences from this gathering since they specifically called for a peaceful protest against the brotherhood march, did not hide their intentions from the law enforcement authorities and designated a specific location for their rally to take place so that it would not come in direct contact with the brotherhood march. Can the petitioners then be held liable for the wrongful conduct of their adherents on the theory that the petitioners were negligent in some respect?

Fundamental principles of the law of negligence and basic precepts of First Amendment law clearly hold that they cannot. When Holland and Stephens made their remarks, they were entitled to believe that the listeners would continue to obey the law. " . . . every person who is himself obeying the law has a right to presume that every other person will perform his duty and obey the law. . . ." "Negligence", 65A *CJS*, § 118 (3). "It is axiomatic that in absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or unlawfully." *Porter vs. California Jockey Club*, 134 Cal. App.2d 158, 285 P.2d 60, 61 (1955)

And because of the paramount value that is placed upon the right of freedom of speech and expression, lower federal and state appellate courts have determined that there can be no such thing as a legally actionable negligent incitement to imminent lawless action. "As is made clear in the Supreme Court's decision in *Hess*, the

'tendency to lead to violence' is not enough. Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine." *Herceg vs. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987), *cert. denied*, ___ U.S.___, 108 S.Ct. 1219, 99 LEd.2d 420 (1988) See also *Olivia N. vs. National Broadcasting Company, Inc.*, 126 Cal. App.3rd 488, 178 Cal. Rptr. 888 (1981).

In considering the issue of whether there can be such a thing as a negligent incitement, the Supreme Court of the State of Rhode Island has held that the incitement exception must be applied with extreme care since the criteria underlying its application are vague. *DeFilippo vs. National Broadcasting Company, Inc.*, 446 A.2nd 1036, 1042 (R.I. 1982) All of the cases that have dealt with this question have determined that the First Amendment rights of the speaker must predominate over the interest of the victim in seeking redress for harm supposedly resulting from speech and the manner in which it was delivered. These courts have so ruled despite the contention that the listener may have been unusually susceptible to the allegedly invidious message so conveyed. *Zamora vs. Columbia Broadcasting System*, 480 F. Supp. 199, 206 (S.D. Fla. 1979)

Thus one clearly discerns a confluence of basic principles of tort law and First Amendment jurisprudence. Section 315 of the *Restatement 2d of Torts* states that:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty

> upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

See also *Abernathy vs. United States*, 773 F.2d 184, 189 (8th Cir. 1985) and *Cook vs. Berlin*, 153 Ariz. 220, 735 P.2d 830 (1987). The petitioners did not have any kind of special relationship with the individuals who threw the rocks and debris such as would have rendered them accountable for their conduct any more than the NAACP had such a relationship with the anonymous figures who coercively enforced the boycott in Claiborne County, Mississippi as such was related in *NAACP vs. Claiborne Hardware Company*, supra. They certainly had no obligation to protect the brotherhood marchers, particularly since law enforcement officers were present at this location in some numbers.

With particular reference to the words supposedly uttered by the petitioner Stephens about "throwing peanuts at the monkeys" these words are not actionable for another compelling reason. They simply do not encourage conduct serious and grave enough to warrant any kind of legal sanction. They are too much akin to the hypothetical situation described by Justice Brandeis in *Whitney vs. California*, 247 U.S. 357, 378 (Brandeis, J., concurring) (1927), overruled in *Brandenburg vs. Ohio*, supra, wherein a group of citizens are accused of banding together to "incite" pedestrians to cross vacant, unmarked land. Such an infraction, if any, is simply too trivial to warrant punishment by government in either the criminal or civil context.

The fact that some of the petitioners thereafter voiced their approbation of the assaults does not render the conduct of the petitioners on January 17, 1987 in Forsyth County constitutionally unprotected. After the fact declarations cannot supply the vital element of causation when it was not present when the crucial events transpired. Moreover, this Court's decision in *Rankin vs. McPherson*, 483 U.S. 378 (1987) holds that an individual's endorsement and approval of violent conduct is itself constitutionally protected speech, particularly if that person was not involved in the incident at issue.

This Court should grant certiorari in this case so that it can set definitive perimeters on the "incitement to imminent lawless action" doctrine. It is important that this Court give direction to lower tribunals who must wrestle with these matters because the political culture of this country for the last forty years has been so heavily impacted by the tactics of public confrontation which so frequently bring competing interest groups into close and acrimonious contact with each other. One need only to glance in the most cursory fashion at the daily newspaper, the evening news, and the weekly news magazines to see how the large number of myriad and diverse interest groups seek to publicize their causes and to therefore influence policy by instigating frequently unpleasant encounters with those persons and institutions whom such activists consider to be particularly powerful and influential. The recent demonstrations by ACT-UP, a group of AIDS research advocates, comes quickly to mind. This form of freedom of expression will be considerably inhibited and chilled if the incitement doctrine is

henceforth given the broad construction that it has received in this case. Any controversial group will be very hesitant to conduct a public demonstration if there is a real and probable danger that it and its leaders will be held liable for the wrongful acts of those who also participate in such an event no matter how loosely related the troublemakers may be to the organization.

Such a concept of culpability, which approaches the idea of strict liability, is wholly inimical to the First Amendment. This Court should review this case not only to correct this manifest error as it occurred in this case, but also to make sure that it does not happen in similar situations in the future.

II. WHEN THE GREATER PART OF THE ACTIVITIES OF CIVIL DEFENDANTS LEADING TO THE IMPOSITION OF LIABILITY ARE PROTECTED BY THE FIRST AMENDMENT, THE RECOVERY OF EXCESSIVE SUMS OF PUNITIVE DAMAGES BY VICTIMS OF UNLAWFUL CONDUCT RESULTING FROM SPEECH BY SAID DEFENDANTS IS PROHIBITED UNLESS THE VICTIMS HAVE SUSTAINED SERIOUS INJURIES.

The jury returned a verdict in favor of the respondents and against the petitioners in the amount of $50.00 in compensatory damages against each of the individual and organizational defendants. However, it assessed punitive damages in the amount of $350,877.19 against each of the petitioner Klan organizations, the amounts of $43,859.65 against the petitioner Holland, and the amounts of $26,415.79 each against the petitioners Carver, Shirley and Stephens. The jury imposed these damages despite the fact that none of the brotherhood marchers

sustained physical or psychological injuries that required any decree of subsequent treatment. Simple arithmetic shows that the amount of punitive damages levied against both of the Klan organizations is 7,000 times the amount of the compensatory damages that were awarded against these two groups. The amount of punitive damages against the petitioners Shirley, Carver and Stephens were 500 times the amount of compensatory damages assessed on an individual basis. As for the petitioner Holland, the amount of punitive damages is 800 times the amount of the compensatory damages that were awarded against him.

Yet, as has been noted, the greater part of the activities that the petitioners undertook with regard to the events of this day were absolutely authorized and protected by the First Amendment. Even if it is assumed that they were in some way responsible for the assaults upon the brotherhood marchers, the record clearly shows that Shirley, Stephens, and Holland attempted to prevent this altercation. The petitioner Carver was not even present when this incident occurred. If the state could not have criminally prosecuted these petitioners on account of their involvement in these events, then neither should the respondents be allowed to extract heavy punitive damages against them through the civil litigation process. This Court has clearly recognized that the fundamental right of freedom of expression can be more thoroughly stifled and suppressed by means of large civil damage awards than it can be through criminal prosecutions. *New York Times Company vs. Sullivan*, 376 U.S. 254, 277 (1964)

Moreover, even if it could be determined that the petitioners intended to physically obstruct this march,

these large punitive damage awards would not be warranted. In *Whitney vs. California*, supra, Justice Brandeis said in his concurring opinion that only a substantial and serious danger of imminent civil disorder would warrant the suppression of speech. 274 U.S. at 376-379. A necessary corollary of this precept is that once it has been determined that speech has brought about an injury, the injury must be serious and substantial to warrant the recovery of a large civil damage award, particularly a large punitive damage award.

The small amount of compensatory damages that the jurors awarded indicates that they did, in fact, realize that the individual marchers did not suffer any lasting harm. But the wholly disproportionate punitive damage awards clearly means that the jurors failed to understand and to acknowledge the fact that the petitioners themselves had a constitutionally protected right to protest against this procession. These awards clearly show that the jury undoubtedly used them as a means for punishing the petitioners for their unpopular political and social views, a judicial act which, of course, is wholly inimical to the First Amendment.

The petitioners posit that when a speaker's misconduct is inextricably intertwined with protected speech, large punitive damages awards should only be authorized when the victim or victims have suffered clearly discernable and serious physical or psychological injuries. To allow huge awards of this kind which are in no way calibrated with actual, compensatory damages must have an obvious chilling effect on freedom of expression. They constitute an intolerable burden that is wholly disproportionate to society's interest in punishing violators

of the law. *United States vs. O'Brien*, 391 U.S. 367, 376-377 (1968)

Another important matter that must be considered is the fact that these respondents are public figures because they held this march in order to create public interest in the demographic makeup of Forsyth County and to draw attention to the county's allegedly racist attitude toward people of color. *Gertz vs. Welch*, 418 U.S. 323, 354 (1974) Therefore, to the extent that these punitive damages awards rest upon the justification that the petitioners inflicted emotional distress upon the marchers on account of the petitioners' alleged misdeeds, the damage awards also contravene the First Amendment in that respect. *Hustler Magazine vs. Falwell*, 480 U.S. 945 (1988) clearly indicates that a public figure cannot recover damages for the intentional infliction of emotional distress unless the defendant purposefully does some act which causes tangible harm to the victim.

This Court's corpus of law concerning defamation actions by public officials or public figures gives ample guidance to this Court in determining whether these damages awards were proper. Since the alleged misdeeds of the petitioners occurred in the context of other conduct that was constitutionally protected, the Court's criteria for determining the propriety of the nature and extent of awards in such defamation cases should be applicable to this situation as well.

> Juries may award substantial sums as compensation for supposed damage to the reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss

> unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Gertz vs. Welch, supra, 418 U.S. at 349.

As has been noted, we live in a political culture that *encourages* political confrontations of this kind. The decisions of the Court have consistently placed a greater value upon freedom of speech and expression, no matter how vulgar and offensive such speech may be, than they have in maintaining an atmosphere of peace and tranquility in the arena of public affairs. This Court has undoubtedly done so because it knows that an obsession with orderliness and placidity is conducive only to creating an environment of deadening intellectual conformity. "But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston, Texas vs. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2515, 96 L. Ed.2d 398, 418 (1987).

This Court should grant certiorari in order to determine whether or not these punitive damages were properly awarded against the petitioners.

CONCLUSION

It is certainly regrettable that any of the marchers were hurt in any way during the course of their procession. Nevertheless, this incident affords no reasonable basis for mulcting tremendous sums of money from these petitioners in the form of punitive damages when they were simply exercising their constitutional rights in the same manner as were the respondents. If the judgment below is allowed to stand the basic values of freedom and dignity that underlie our constitutional form of government will be denigrated in a manner far worse than anything that these petitioners could ever be capable of doing.

For all the reasons set forth above, this Court should grant this petition for a writ of certiorari, review the decision of the Court of Appeals for the Eleventh Circuit, reverse that decision and order that the respondents' complaint be dismissed, or, in the alternative, that the punitive damage awards be either expunged from the judgment or substantially reduced.

This 3 day of April, 1990.

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APPENDIX

NO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8092
Non-Argument Calendar

D. C. Docket No. 1:87-cv-565-CAM

HOSEA WILLIAMS, Individually and on behalf of all black citizens of the State of Georgia, and JAMES E. MCKINNEY,

Plaintiffs-Appellees,

versus

SOUTHERN WHITE KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, an unincorporated association, and its agents, servants, employees and assigns, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(October 27, 1989)

Before Clark and Cox, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This is an appeal from a jury verdict in favor of the appellees in the United States District Court for the Northern District of Georgia, Atlanta Division, and against the appellants, two Ku Klux Klan organizations

and four individual members thereof, for a conspiracy to deprive the appellees of their civil rights. 42 U.S.C. §1985(3). The jury awarded both compensatory and punitive damages. We affirm.

FACTS:

To commemorate the birth of Dr. Martin Luther King, Jr., and to promote racial harmony, organizers scheduled and held a "Brotherhood March" on January 17, 1987, in Forsyth County, Georgia. Several days prior to this march, representatives of two Ku Klux Klan groups, the Southern White Knights and the Invisible Empire, met to develop a strategy for disrupting the march. Present at this meeting were David Holland, Grand Dragon of the Southern White Knights; Edward Stephens, Grand Dragon of the Invisible Empire; Daniel Carver, Great Titan of the Invisible Empire; and Frank Shirley, a member of several white supremacist groups.[1] Pursuant to their discussions,[2] the defendants implemented their plan. Shirley prepared a "flier" in the name of a non-existent committee exhorting persons to attend a counterdemonstration on the day of the Brotherhood March. The flier listed as an address a post office box rented by Shirley in the name

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[1] The two Klan organizations and twelve individuals were named as defendants. No liability was found against one individual defendant. The two Klan organizations and the remaining eleven defendants were found liable. Only the two Klan organizations and the four individuals identified above are parties to this appeal.

[2] The evidence indicates that these four persons maintained constant communications via telephone with one another and with some of the other defendants during the days leading up to the Brotherhood March.

of the Klan. Shirley dispatched the flier to Holland via Earl Watts, another defendant. Holland arranged for the printing of the flier, and Holland, Shirley and Watts distributed the publications prior to the march. Shirley also painted signs reading "Keep Forsyth White," signs which were picked up on the day of the march and carried by the counterdemonstrators. Prior to the march, Carver stated to a reporter that he had arranged for approximately one hundred (100) Klan members, some "robed" and some not, to attend the march.

On the morning of the scheduled Brotherhood March, Holland framed a parking area with Confederate flags, and it was there that the Klan members and sympathizers met to begin the counterdemonstration. Both Shirley and Stephens were present; Carver was absent from the site. Holland addressed the throng in part:

> At 10:00 o'clock, we need to walk down here to the corner, where those pickaninnies are. We need to let 'em know that we're gonna keep this place white. We mean for it to stay white. You can't have law and order and niggers too. I say one's gotta go. Let it be the niggers. . . . This is a God-Fearing community, let's send the creeps on back to the watermelon fields of Atlanta, Georgia. We don't want 'em, don't need 'em, and won't stand for it. And I say let's give 'em a good Forsyth County welcome where we'll keep 'em out of here for seventy more years. Let's disperse and go greet those filthy half-ape niggers, brothers.

ROA Exhibits, Plaintiffs' Exhibit No.1 (a videotape). Following this speech, Holland led some of his listeners to a field previously secured by Earl Watts for the use of the counterdemonstrators.

The Brotherhood March began approximately thirty minutes after Holland's speech. Despite the efforts of law enforcement officials to isolate the marchers from the counterdemonstrators, the Klan members and sympathizers climbed the fences separating the two groups and moved toward the marchers, throwing rocks and bottles and shouting obscenities and racial epithets. Though the four persons who are appellants here apparently did not throw rocks or bottles in the direction of the marchers, two other defendants stated that the encouragement of Stephens and Holland prompted them to hurl rocks at the marchers. One of those defendants, Thomas Gayton, testified that he saw the Klan flier, that he went to the scene expecting violence and that he understood from Holland's statements at the scene that the march was to be stopped. Both Wesley Walraven, Sheriff of Forsyth County, and Wayne Lindsey, Chief of Police of Cumming, Georgia, testified as to the vehemence of the crowd and the extent of the violence. As the mob of counterdemonstrators surrounded the marchers and their bus, Sheriff Walraven became convinced that he could no longer ensure the safety of the marchers, and he halted the march. With the cooperation of the marchers, Sheriff Walraven loaded them on the bus and moved them some distance down the planned route and away from the violent counterdemonstrators who continued to pelt the bus with objects as it moved away. Several marchers testified at trial about the physical and emotional injuries they suffered.

The next day, in a speech to klansmen in Raleigh, North Carolina, Holland applauded the disruption of the march in the following manner:

> Last night in Forsyth County, Georgia, the Ku Klux Klan sent that nigger Hosea Williams and his busload of race traitors back to Atlanta. Brothers and sisters, we sent 'em back with three or four windows busted out of that bus.
>
> * * *
>
> And I say, brothers and sisters, if those blue-gummed, ape-drunken, gorilla-smelling niggers come sticking their nose in your business, you ought to send them home like we did, with bottles and rocks up aside their heads.

ROA Exhibits, Plaintiffs' Exhibit No.72. The same day, the following message could be heard upon dialing a certain telephone number identified as the Invisible Empire, Ku Klux Klan (Danny Carver), Oakwood, Georgia:

> Hello, this is Daniel Carver and I had a dream. And Saturday in Forsyth County my dream came true. We had thousands of white people standing together and ready to fight to keep their town clean and free of niggers and the high crime and poverty that they breed. Niggers were not ran (sic) out of Forsyth County with politics and they will not be kept out now with politics[,] but the black animals will be kept out with rocks, bottles, fire, guns and by the grace of God. And the Ku Klux Klan is ready to stand with the white people in Forsyth County anytime the niggers try to return.

ROA Exhibits, Plaintiffs' Exhibit No.74 (transcript of recorded telephone message). The official newspaper of the Invisible Empire, The Klansman, alluded to the Klan's participation in the counterdemonstration:

> What was supposed to have been a black victory, turned into a black disaster on Saturday January 1[7], 1987, as over 100 members of the

> Invisible Empire, Knights of the Ku Klux Klan and their supporters drove 75 black reprobates and freedom marchers from this community located in all white Forsyth County.
>
> * * *
>
> As the invading black agitators started marching, people in the flag waving crowd began hurling rocks, bottles and dirt. Then, as a wave of patriotism spread over the onlookers, the courageous crowd charged the marchers and their bodyguards and drove them back to their buses. Needless to say, the marchers hastily returned to Atlanta.

ROA Exhibits, Plaintiffs' Exhibit No.66 (brackets in original).

At the conclusion of the evidence, the jury returned a verdict in favor of the plaintiffs/appellees. The jury found eleven of the twelve individual defendants and both of the Klan organizations liable for the section 1985(3) violations and awarded the plaintiffs both compensatory and punitive damages.

DISCUSSION:

The defendants first fault the district court's handling of inquiries by the jury. During its deliberations, the jury twice submitted questions to the trial court. The presiding judge responded to those questions without informing counsel for either party of the content of the questions or the court's responses. The questions propounded by the jury and the court's answers were as follows:

Q. Who gets the punitive damage money?

A. All plaintiffs.

> Q. On punitive damages, is it the amount we choose multiplied by the number of plaintiffs, or is the amount we select paid a one-time amount? (Emphasis in original.)
>
> A. A one time amount divided by number of plaintiffs get individual shares.
>
> Q. If we find a defendant liable, must he pay the same compensatory amount as all other defendants, or can we designate a lesser or greater amount?
>
> A. You are the judge of what is the correct amount, but you must so indicate on your verdict. But the aggregate of all compensatory awards will then be the joint, as well as several liability of all defendants found liable.

ROA Vo1.5-158. The jury submitted the first two questions simultaneously. The final inquiry was submitted approximately thirty minutes after the first two.

The appellants are correct in asserting that the trial court should not give supplementary instructions to the jury in the absence of the parties and prior to affording them an opportunity either to be present or to make timely objection. *Rogers v. United States*, 422 U.S. 35, 38, 95 S.Ct. 2091, ___, 45 L.Ed.2d 1, 6 (1975). However, when these instructions are responsive to the jury's question, correctly state the law and do not prejudice the appellant, such error is harmless. *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir. 1976);[3] *see Rogers*, 422 U.S. at 40, 95 S.Ct. at 2095, 45 L.Ed.2d at 6; *United States v. Betancourt*, 734 F.2d 750, 759 (11th Cir. 1984).

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

The appellants admit that the district court's answer to the jury's final question was distinctly responsive, correctly stated the law and was not prejudicial. They contend, though, that the court's answers to the first two questions ignored the possibility that one or more of the plaintiffs may have contracted away a portion of any damages recovered as well as the possibility that one or more of the plaintiffs' counsel might have been representing them on a contingent fee basis. The appellants argue that a jury aware of such facts, if true, might reduce the damages awarded. Thus, they maintain that the trial court's failure to inquire into such arrangements prejudiced them before the jury.

This argument is without merit. The appellants cite no authority for the proposition that a jury is entitled to be told of how a plaintiff proposes to dispose of any damages once awarded. To the extent that the jury was entitled to know, the district court gave adequate instructions to it, and the appellants suffered no prejudice. Therefore, while we acknowledge that counsel for both parties are entitled to be present during and participate in any communication between the court and the jury, in this instance the failure to follow this procedure was harmless error.

The appellants' second assignment of error involves the trial court's instructions to the jury. The plaintiffs' complaint alleged a conspiracy which had as among its goals a deprivation of both their right to travel and their rights under the first amendment to the United States Constitution. Section 1985(3) constitutionally can and does protect the right to travel from interference by purely private conspiracies. *Carpenters v. Scott*, 463 U.S. 825,

832-33, 103 S.Ct. 3352, ___, 77 L.Ed.2d 1049, 1057 (1983). However, "a conspiracy to violate First Amendment rights is not made out without proof of state involvement." *Id.* at 832, 103 S.Ct. at ___, 77 L.Ed.2d at 1056. Hence, to establish liability under section 1985(3), the plaintiffs had "to prove that the state was somehow involved in or affected by the conspiracy." *Id.* at 833, 103 S.Ct. at ___, 77 L.Ed.2d at 1057.

The trial court did not instruct the jury concerning the necessity of state involvement. However, since the appellants failed to object to this omission at trial, we cannot consider an objection now made before us absent plain error. *Puritan Insurance Co. v. Butler Aviation-Palm Beach*, 715 F.2d 502, 504 (11th Cir. 1983). "Plain error is error which, when examined in the context of the entire case, is so obvious that [our] failure to notice it would seriously affect the fairness and integrity of judicial proceedings." *United States v. Sans*, 731 F.2d 1521, 1532 (11th Cir. 1984) (brackets in original).

The appellants state in their brief that "[c]learly, the state was affected during the Brotherhood March. As setout (sic) in the Statement of Facts, state officials provided security, made arrests, attempted to protect marchers and relocated the marchers." Brief for Appellant at 17. These statements reflect the undisputed facts. Taken in the context of the entire case, we find that the trial court's failure to instruct the jury regarding an undisputed fact was not plainly erroneous.

The appellants continue this avenue of attack by contending that, even though the state was affected to some extent by the conduct of the counterdemonstrators,

there was insufficient evidence produced to prove that the defendants acted as parties to the conspiracy. This argument in reality challenges the jury's determinations that a conspiracy existed and that the conspirators violated the marchers' constitutional rights.

In reviewing a jury's verdict, we are not entitled to weigh the evidence anew. *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799, 801 (11th Cir. 1985). Instead, the issue is whether the evidence presented and the inferences reasonably to be drawn from it support the jury's verdict. *Id. ; see Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326-27 (11th Cir. 1982). Properly drawn inferences are those that "reasonable and fair-minded persons in the exercise of impartial judgment might draw from the evidence." Daniels, 692 F.2d at 1326. We conclude that the verdict reached by the jury finds ample support in the record. The evidence and the reasonable inferences drawn therefrom solidly support the jury's ultimate determination that the two Klan organizations and the individual defendants plotted not only to avail themselves of the opportunity to express views contrary to those held by the marchers but also to disrupt and stop the Brotherhood March by violent means. The evidence further supports the necessary determination that the appellants caused the violence which erupted and which prompted the police to halt the march and to relocate the marchers.

The appellants' next contention that "[i]f any conspiracy existed it was a legal consort for the expression of First Amendment ideas" is specious. *See* Brief for Appellants at 19. While the first amendment protects the appellants' rights to hold and express their ideas, it clearly does not authorize them to concoct and implement a

conspiracy the aim of which is to interfere with the appellees' constitutionally and statutorily protected rights. The jury concluded that these appellants conspired among themselves and with others to disrupt the Brotherhood March, a conspiracy which extended far beyond either "mere advocacy" or the "abstract expression of ideas" to include a violent assault upon both the appellees and the law enforcement officials on the scene. Such conduct is not protected by the first amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

Finally, the appellants claim that the punitive damages are excessive and disproportionate to the compensatory damages awarded.[4] No reported case in this circuit has addressed the availability of punitive damages in a section 1985(3) case. However, this court has stated that a jury may award punitive damages in a civil rights action upon its determination that the defendant was motivated by an evil motive or intent or where the defendant was recklessly or callously indifferent to federally protected rights. *Anderson v. City of Atlanta*, 778 F.2d 678, 688 (11th Cir. 1985) (a section 1983 action), citing *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, ___, 75 L.Ed.2d 632, 651 (1983).[5]

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[4] The jury awarded compensatory damages amounting to $2,500.00. It assessed punitive damages against these appellants as follows: the two Ku Klux Klan organizations – $350,877.19 each; Holland – $43,859.65; and Carver, Shirley and Stephens – $26,315.79 each.

[5] In *Smith*, the Supreme Court discussed both the common law of torts and the Civil Rights Act of 1871, an Act in which sections 1983 and 1985 originate, in announcing the standard for the award of punitive damages relied upon in *Anderson*.

In considering the propriety of and the standard for the amount of punitive damages in a section 1985 case, the Seventh Circuit stated that the criteria announced in Smith should apply equally as well in section 1985 cases as in section 1983 cases. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1266-67 (7th Cir. 1984). "Since Section 1985 also originates from the 1871 Act, and has no contrary policy or purpose mandating a different approach, the *Smith v. Wade* standard for assessing punitive damages applies to it as well." *Bell*, 746 F.2d at 1267. We agree.

Having determined that a jury properly may award punitive damages in a section 1985(3) case, we consider the appellants' contentions of excessiveness and disproportionality in light of the well established rule that "[b]road discretion is traditionally accorded to juries in assessing the amount of punitive damages. . . ." *Glover v. Alabama Dept. of Corrections*, 734 F.2d 691, 694 (11th Cir. 1984)[6] (affirming in a section 1983 case the grant of $25,000.00 in punitive damages though only $1.00 was awarded in compensatory damages), citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1980). Here, the jury assessed punitive damages against the defendants in varying amounts, reflecting its consideration of the evidence and its appreciation of the

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[6] A petition for rehearing was denied with an opinion. *Glover v. Alabama Dept. of Corrections*, 753 F.2d 1569 (11th Cir. 1984). Certiorari was granted and the judgment vacated at 474 U.S. 806, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985). On remand from the Supreme Court, the panel reinstated its previous opinion except for that portion of the opinion addressing attorney's fees. *Glover v. Alabama Dept. of Corrections*, 776 F.2d 964 (11th Cir. 1985).

relative egregiousness of the defendants' conduct. Those damages are neither excessive nor unconscionable and will not be disturbed.

Accordingly, the judgment of the district court is A F-F I R M E D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-8092

HOSEA WILLIAMS, Individually and
on behalf of all black citizens
of the State of Georgia, and
JAMES E. MCKINNEY,

Plaintiffs-Appellees,

versus

SOUTHERN WHITE KNIGHTS, KNIGHTS OF
THE KU KLUX KLAN, an unincorporated
association, and its agents, servants,
employees and assigns, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion 10-27-89, 11 Cir., 1989, ___ F.2d ___).

(December 4, 1989)

Before CLARK and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge